BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CHRISTOPHER T. CARSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,017,106
RAWHIDE TRUCKING, INC.	)	
Respondent	)	
AND	)	
	)	
CONTINENTAL WESTERN INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the October 15, 2004 preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes. Claimant was awarded benefits after the Administrative Law Judge (ALJ) determined that K.S.A. 2003 Supp. 44-503c does not preclude claimant from collecting benefits, as he is not an "owner-operator" as defined by that statute. Instead, claimant was found to be an employee of respondent, thereby establishing entitlement to benefits under the Kansas Workers Compensation Act.

ISSUES

The specific issues raised by respondent in its Application for Review are as follows:

"1. Whether the claimant is an employee/statutory employee of Rawhide Trucking, Inc., thus, does there exist an employer/employee relationship.

"2. Whether the claimant's alleged personal injury arose out of and in the course of his employment with Rawhide Trucking, Inc."[1]

[1] Application for Review dated Oct. 28, 2004.

Additionally, the Board has determined that there is a question regarding the identity of the attorney representing respondent. Attorney Kirby A. Vernon entered his appearance in this matter on July 23, 2004. The matter went to preliminary hearing on July 22, 2004, with Mr. Vernon being present at that time. After the October 15 Order was issued, Attorney Vernon filed the Application For Review with the Kansas Division of Workers Compensation. However, on October 25, 2004, three days before the appeal was filed, Attorney Eric T. Lanham, of McAnany, Van Cleave and Phillips, entered his appearance as representative of respondent and the insurance carrier in this matter. There has been no withdrawal from this matter by Attorney Vernon, thereby indicating his continued involvement in this case. The Board will issue its decision in this matter with a copy going to claimant's attorney and both respondent attorneys of record pending clarification of respondent's actual legal representative.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds the Order of the Administrative Law Judge should be affirmed, although on other grounds.

Claimant alleges he is an employee of respondent, Rawhide Trucking, Inc. (Rawhide), for the purposes of the Kansas Workers Compensation Act. A lease agreement was entered into on April 25, 2003, between Rawhide and Carson & Sons Transportation, Inc. (Carson, Inc.), allowing for the use of certain motorized vehicles owned by Carson, Inc., but leased to Rawhide. This lease agreement[2] goes into significant detail about the rights and liabilities of the various parties. Claimant, the vice president of Carson, Inc., and the son of the owners, was performing work for Rawhide when, on March 24, 2004, while working in the back of a trailer, wind blew him off the trailer, causing him to land on his left knee, left arm and left shoulder. Other than an examination by Pedro A. Murati, M.D., claimant's medical expert, claimant has received no medical treatment in this matter.

Respondent contends that claimant is precluded from obtaining benefits in this matter under K.S.A. 2003 Supp. 44-503c(a)(1), which states in part:

> Any individual who is an owner-operator and the exclusive driver of a motor vehicle that is leased or contracted to a licensed motor carrier shall not be considered to be a contractor or an employee of the licensed motor carrier within the meaning of K.S.A. 44-503, and amendments thereto, or an employee of the licensed motor carrier within the meaning of subsection (b) of K.S.A. 44-508, and amendments thereto, and the licensed motor carrier shall not be considered to be a principal

[2] P.H. Trans., Resp. Ex. 1.

> within the meaning of K.S.A. 44-503, and amendments thereto, or an employer of the owner-operator within the meaning of subsection (a) of K.S.A. 44-508, and amendments thereto, if the owner-operator is covered by an occupational accident insurance policy and is not treated under the terms of the lease agreement or contract with the licensed motor carrier as an employee for purposes of the federal insurance contribution act, 26 U.S.C. § 3101 *et seq*., the federal social security act, 42 U.S.C. § 301 *et seq*., the federal unemployment tax act, 26 U.S.C. § 3301 *et seq*., and the federal statutes prescribing income tax withholding at the source, 26 U.S.C. § 3401 *et seq*.

Claimant, on the other hand, argues that K.S.A. 2003 Supp. 44-503c does not apply, as claimant does not qualify as an owner-operator. The lease document in question does identify a tractor-trailer which was being leased to Rawhide by Carson, Inc. The tractor-trailer in question was identified as being the property of Carson, Inc., with claimant having no ownership interest in that tractor-trailer. However, the Board does note that the corporation, which owns the tractor-trailer, employs claimant as its vice president. The exact ownership status and extent of claimant's involvement in that corporation is not contained in this record other than to identify him as vice president of the corporation. The ALJ did determine that the ownership of the truck in question appears to belong to the corporation rather than claimant as an individual. Therefore, claimant is found to only be an operator, rather than an owner-operator as is required under the statute.

The Board, in reviewing claimant's status with the various legal entities in this matter, finds the record to be incomplete. While claimant is an employee of Carson, Inc., as a vice president, there is some question whether claimant is an employee of Rawhide. While claimant drives trucks for Rawhide, he is provided no compensation by Rawhide. Instead, the lease agreement sets forth the payments which are to be made by Rawhide to Carson, Inc., for the utilization of the tractor-trailer. The payments from Rawhide are then utilized by Carson, Inc., in paying claimant what salary or wages he is due. Additionally, Rawhide deducts no taxes of any kind from the monies paid to Carson, Inc. Any employment or self-insurance or other federally mandated taxes deducted for claimant's benefit are done by Carson, Inc.

Claimant, as an employee of Carson, Inc., may be entitled to workers compensation benefits. However, there is no indication in this record whether Carson, Inc., provided workers compensation insurance.

Additionally, the record does not sufficiently support claimant's status as an employee of Rawhide. It is unclear in this instance whether claimant is an employee of Rawhide or an independent contractor.

> It is often difficult to determine in any given case whether a person is an employee or an independent contractor since there are elements pertaining to both

> relations which may occur without being determinative of the relationship. In other words, there is no exact formula which may be used in determining if one is an employee or an independent contractor. The determination of the relation in each instance depends upon the individual circumstances of the particular case.[3]
>
> The primary test used by the courts in determining whether an employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee, and the right to direct the manner in which the work is to be performed, as well as the result which is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control, which renders one a servant rather than an independent contractor.[4]

In this instance, claimant has failed to introduce evidence that respondent either exercised or had the right to exercise control over claimant's activities. It is acknowledged that respondent apparently gave claimant direction on which loads to carry, but the actual manner of claimant's performing those activities is not contained in this record. Likewise, whether respondent had the right to control and supervise the work performed by claimant is also not contained in this record. Claimant has, therefore, failed to prove that he is an employee of respondent in this instance.

The Board, however, considers this situation to be more under the control of K.S.A. 44-503, which deals with subcontracting. In this instance, Rawhide is in the business of transporting materials, with the use of tractors and trailers, across the highways of America. That would appear to be Rawhide's trade or business. Carson, Inc., as a contractor, has agreed to perform and has contracted with Rawhide for the execution of these transportation activities.

K.S.A. 44-503(c) allows a worker to recover compensation under the Workers Compensation Act from either the contractor or the principal. Claimant, therefore, is entitled to bring a claim either against Carson, Inc., as his employer, or against Rawhide, as the principal in this legal relationship. The election is claimant's to make under K.S.A. 44-503.

> It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to

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[3] *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

[4] *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

> both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.[5]

The Board finds, in this instance, that claimant has proven that he is an employee of Carson, Inc., under the Workers Compensation Act, with Carson, Inc., acting as a contractor to Rawhide, the principal in this legal relationship. Therefore, claimant's election to pursue workers compensation benefits through Rawhide is statutorily proper. The Board affirms the determination by the ALJ that claimant is entitled to benefits under the Workers Compensation Act and affirms the Order of the ALJ requiring that respondent provide a list of three physicians to claimant, from which claimant may select the authorized treating physician, with the limitations set forth by the ALJ also applying to the Order of the Workers Compensation Board.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated October 15, 2004, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February, 2005.

BOARD MEMBER

c: Robert R. Lee, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
Eric T. Lanham, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[5] K.S.A. 44-501(g).